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23
24 **UNITED STATES DISTRICT COURT**
25 **DISTRICT OF ARIZONA**

26 SolarCity Corporation,
27 Plaintiff,
28 vs.
29 Salt River Project Agricultural
30 Improvement and Power District; Salt
31 River Valley Water Users' Association,
32 Defendants.

33 Case No. 2:15-CV-00374-DLR

34 **DEFENDANT SALT RIVER**
35 **AGRICULTURAL IMPROVEMENT**
36 **AND POWER DISTRICT'S MOTION**
37 **TO DISMISS AND SUPPORTING**
38 **MEMORANDUM**

39 **Oral Argument Requested**

40 This case comes before the Court in the midst of a national policy debate over how
41 to integrate rooftop solar systems into the electrical grid, who should bear the cost of
42 subsidizing the rooftop solar industry, and how the costs of maintaining the grid should
43

1 be recovered from those who benefit from it—including from rooftop solar customers
 2 who indisputably rely on the grid for much of their power. First Amended Complaint
 3 (“FAC”) ¶ 4. Utilities around the country, including the Salt River Project Agricultural
 4 Improvement and Power District (the “District”), have recognized that traditional pricing
 5 models are ill-suited to recovering costs required to serve customers who self-generate a
 6 portion of their electricity needs. The District’s current Standard Electric Price Plans
 7 (“SEPPs”—challenged here under the antitrust laws—include a pricing mechanism to
 8 address these flaws and to effectuate the basic bargain the District has with all of its
 9 customer classes: that customers in each class pay their fair share of the costs of service.

10 Not surprisingly, SolarCity does not ask this Court to mandate the reinstatement of
 11 the direct subsidies and incentives the District has voluntarily provided to rooftop solar
 12 customers in the past. *Id.* ¶ 72 (referencing \$150 million of past solar incentives from the
 13 District to support the adoption of self-generation technologies). It does, however, ask
 14 this Court to set aside the decision of the District’s publicly elected Board of Directors
 15 (the “Board”—issued after a robust public process—to discontinue the indirect subsidies
 16 embedded in past rate plans. But the antitrust laws provide no basis to mandate a
 17 continuation of those indirect subsidies any more than they would require their
 18 imposition in the first place. Those are fundamentally questions of public policy that
 19 Arizona law has left to the Legislature and the District’s Board, and that therefore are
 20 beyond the purview of the federal judiciary to resolve.

21 The District is an agricultural improvement district and—as a matter of law—is
 22 designated as a public, political subdivision of the state, with all rights, privileges,
 23 benefits, immunities and exemptions granted municipalities and other political
 24 subdivisions under the Arizona Constitution or state law. Ariz. Const. Art. 13, § 7 and
 25 A.R.S. § 48-2302. Governed by an elected Board, the District is obligated to meet both
 26 the power and water needs of its service territory and is expressly authorized under state
 27 law to generate and sell electricity “[t]o reduce the cost of irrigation, drainage, and power
 28 to the owners of land in the district.” A.R.S. § 48-2303(A)(7). Thus, while SolarCity

1 purports to challenge only the specific rate plan adopted by the District's Board, it
 2 actually attacks the policy judgment of the Arizona Legislature to preserve the Salt River
 3 Project as a federal reclamation project under the supervision of an elected Board of
 4 Directors, as well as the policy judgment of that Board with respect to the best interests
 5 of the District's customers.

6 Having failed to advance its policy and commercial objectives before the District's
 7 Board, SolarCity now asks this Court to insert itself as the District's rate regulator and
 8 replace the results of the regulatory process the Arizona Legislature has prescribed for
 9 setting the District's electricity rates with its own judgment. But the federal courts are
 10 not intended to be rate regulators and the antitrust laws are not designed to replace
 11 Arizona's state regulatory and political processes.¹ Federal and State statutes protect the
 12 District from actions for damages alleged to arise from its rate-setting (§ I, *infra*), and the
 13 state action immunity doctrine (§ II), the filed-rate doctrine (§ III), and the *Noerr-*
 14 *Pennington* doctrine (§ IV) preclude the antitrust laws from being used to thwart
 15 Arizona's state regulatory and political processes.

16 Separate from these doctrines, SolarCity's federal antitrust claims should be
 17 dismissed for lack of standing because SolarCity does not, and cannot, allege that it
 18 suffered an injury as a customer of the District and has admitted in other proceedings that
 19 it does not compete with the District or other utilities. (§ V). SolarCity's FAC also fails
 20 to properly state a claim upon which relief can be granted under any of its various causes
 21 of action. (§ VI). Its state law claims fail for the additional reasons that SolarCity did not
 22 follow the mandatory process under A.R.S. § 30-810 for challenging the Board's decision
 23 (§ VII), and the FAC fails to state a cause of action under those claims (§ VIII).

24 To the extent SolarCity disagrees with the Board's decision concerning the
 25 District's rates, it had and has numerous opportunities to pursue its agenda through the
 26

27 ¹ *Verizon Commn's Inc. v. Law Offices of Curtis V. Trinko*, 124 S. Ct. 872, 879 (2004) (antitrust
 28 courts are "ill-suited" to "act as central planners, identifying the proper price ... and other terms of dealing.").

1 Board's legislatively mandated, public rate-setting process; by application for rehearing
 2 pursuant to A.R.S. § 30-810; or through the political process. What SolarCity may not do,
 3 however, is misuse the antitrust laws to serve its own narrow business interests and, in
 4 the process, displace the State of Arizona's considered policy judgments concerning the
 5 most effective way of ensuring the continued reliable supply of electricity and water to its
 6 citizens. Accordingly, the District hereby moves to dismiss SolarCity's FAC in its
 7 entirety and with prejudice.

8 **BACKGROUND²**

9 **A. The Regulatory Process Governing The District's Rate-Making**

10 Before making changes to its price plan, the District must "provide public notice
 11 of proposed changes" to its rates. *Id.* at §§ 30-802(B)(1), 48-2334(B). Then, the District
 12 must make specific information available to the public, *id.* at §§ 30-802(B)(2), 48-
 13 2334(C), and provide an opportunity to comment. *Id.* at §§ 30-802(B)(3), 48-2334(D).
 14 The Board is also required to hold a public meeting where District management,
 15 consultants, and any interested persons must be afforded an opportunity to submit written
 16 comments or make oral presentations. *Id.* After completing this process, and making
 17 modifications as it deems fit, the Board votes on the proposed rate changes. *Id.* at §§ 30-
 18 803(B)(4), 48-2334(E). If dissatisfied with the Board's decision, the Arizona Attorney
 19 General or "any party to the action or proceeding" may file a notice of rehearing with the
 20 Board within twenty days of the order and, within thirty days after rehearing is denied or
 21 granted, seek judicial review. *Id.* at §§ 30-810 to -812.

22 **B. The District's 2014-2015 Rate Changes**

23 The District adhered to this regulatory process during the 2014-2015 pricing
 24 process. On December 12, 2014, the District opened the process to consider proposed
 25 rate changes. Notice was provided to the public and instructions were given regarding
 26

27 ² The District hereby incorporates the background section of the Motion to Dismiss of the
 28 Salt River Valley Water Users Association (the "Association") setting forth the history of
 the Salt River Project and the evolution of the District and the Association.

1 how to participate.³ The proposal included a general 3.9% overall average annual
 2 increase for all residential price plans and a new rate plan for self-generation customers,
 3 SEPP E-27.⁴ The proposal explained that the District incurs substantial costs to build and
 4 maintain the infrastructure necessary to meet the combined peak demand of its
 5 customers.⁵ Although a customer with rooftop solar panels typically requires less total
 6 electricity from the District, those solar panels do not reduce significantly (if at all) that
 7 customer's peak demand for power from the District. *Supra* note 5. Therefore, in a given
 8 month, a self-generating customer could have close to zero net power usage, but still have
 9 very high peak demand (demand the District is required by law to meet). *See supra* note
 10 5. SEPP E-27 accounts for this imbalance through a targeted demand charge. *See supra*
 11 note 5, at 4-5.

12 The District's Legal Notice notified members of the public they could submit (i)
 13 comments and proposals, (ii) questions to management, (iii) requests for documents from
 14 management, and (iv) requests for interviews with District management and the District
 15 Board's consultants. *See supra* note 4. Public sessions were held on January 5, January
 16 8, February 9, February 12, February 19, and February 26, 2015, at some of which the
 17 Board heard presentations (including from SolarCity) and received public comments on
 18 the proposal.⁶ Moreover, from December 12, 2014 to April 30, 2015, the District made
 19 the information required by A.R.S. §§ 30-802(B)(2) and 48-2334(C) available for
 20 inspection. In addition, the District's management and consultants were available for
 21 interviews, including interviews by SolarCity on January 15, 2015.⁷ On February 26,

22
 23 ³ *See* SRP Legal Notice (Dec. 12, 2014) (Request for Judicial Notice ("RJN") Ex. 8).

24 ⁴ *See* Executive Summary at 1 (Feb. 9, 2015) (RJN Ex. 9).

25 ⁵ "Demand" is the "total amount of electricity being used by customers at a given time." "<http://www.srpnet.com/electric/business/glossary.aspx>". Thus, "peak demand" is the
 26 largest amount of electricity demanded over a given time period.

27 ⁶ *See generally*, Public Pricing Process,
<http://www.srpnet.com/prices/priceprocess/default.aspx>.

28 ⁷ *See* Interviews by TASC and SolarCity with John Chamberlin and Tim Lyons and the
 District's Management, 2014/2015 Salt River Project Price Process, in Tempe, Ariz. (Jan.
 15, 2015) (transcript on file with the District).

1 2015, the Board modified the original proposal and then approved the SEPPs.⁸

2 **ARGUMENT**

3 **I. THE DISTRICT HAS ABSOLUTE IMMUNITY FROM DAMAGES**

4 **A. The LGAA Provides The District Absolute Immunity From Federal**

5 **Antitrust Damages Claims**

6 The Local Government Antitrust Act of 1984 (“LGAA”) provides the District

7 absolute immunity from damage claims arising under the antitrust laws. The LGAA

8 states that “[n]o damages, interest on damages, costs, or attorney’s fees may be

9 recovered” in an antitrust action “from any local government, or official or employee

10 thereof acting in an official capacity.” 15 U.S.C. § 35(a). Congress enacted the LGAA

11 to “allow local governments to go about their daily functions without the paralyzing fear

12 of antitrust lawsuits.” S. Rep. No. 98-593, at 3 (1984). Consequently, “a court should

13 strive to resolve the [LGAA] immunity issue as early as possible, with a minimum of

14 expense and time to the parties.” *Sandcrest Outpatient Servs. P.A. v. Cumberland Cty.*

15 *Hosp. Sys., Inc.*, 853 F.2d 1139, 1148 n.9 (4th Cir. 1988).

16 The LGAA broadly defines “local government” to include “a school district,

17 sanitary district, or any other special function governmental unit established by State law

18 in one or more States.” 15 U.S.C. § 34(1); *Palm Springs Med. Clinic, Inc. v. Desert*

19 *Hosp.*, 628 F. Supp. 454, 457 (C.D. Cal. 1986). The ““special function governmental unit”

20 provision” is construed broadly, and is “designed to protect those political subdivisions of

21 the state, which though they do not have broad governmental powers, nonetheless serve a

22 public function in the provision of a particular service.” *Capital Freight Servs., Inc. v.*

23 *Trailer Marine Transp. Corp.*, 704 F. Supp. 1190, 1198 (S.D.N.Y. 1988). Congress

24 intended to immunize entities like the District: political subdivisions with limited

25 governmental powers: “[e]xamples of special purpose political subdivisions include[] ...

26 planning districts, water districts, sewer districts, irrigation districts, drainage districts,

27

28 ⁸ See Press Release, SRP Board Approves Reduced Price Increase (Feb. 26, 2015).
<http://www.srpnet.com/newsroom/releases/022615.aspx>.

1 road districts, and mosquito control districts.” H.R. Rep. No. 98-965, at 19-20 (1984),
 2 *reprinted in* 1984 U.S.C.C.A.N. 4602, 4620-21.

3 The District is an agricultural improvement district under A.R.S. § 48-2301 *et seq.*
 4 As such, it is a “public, political, taxing subdivision of the state,” A.R.S. § 48-2302,
 5 expressly authorized to exercise certain powers common to local governments.⁹ Under
 6 the Arizona Constitution, it is “vested with all the rights, privileges and benefits, and
 7 entitled to the immunities and exemptions granted municipalities and political
 8 subdivisions under ... any law of the state or of the United States.” Ariz. Const. Art. 13, §
 9 7. Because municipalities have “blanket and absolute” immunity under the LGAA, the
 10 District receives the same protection, *Palm Springs*, 628 F. Supp. at 458.¹⁰

11 **B. The District Is Immune From SolarCity’s State Law Damages Claims**

12 The District is a “[p]ublic entity” under Arizona law. *See* A.R.S. § 12-820(7)
 13 (“[p]ublic entity includes ... any political subdivision of this state”). Public entities
 14 possess “absolute immunity” in the “exercise of a ... legislative function” or “an
 15 administrative function involving the determination of fundamental governmental
 16 policy.” *Id.* § 12-820.01. Setting and regulating electricity rates is a legislative function.
 17 *See Ariz. Corp. Comm’n v. State ex rel. Woods*, 171 Ariz. 286, 291 (Ariz. 1992)
 18 (ratemaking is an exercise of “legislative power”).¹¹ SolarCity’s FAC challenges only the
 19

20 ⁹ *See, e.g.*, A.R.S. § 48-2340 (power of eminent domain); *id.* § 48-2339 (power to
 21 construct works across public and private property); *id.* § 48-2341 (power to survey
 22 land); and *id.* § 48-2442 (power to call elections for bond issuances). Moreover, like
 23 other local governments, the District is governed by an *elected* board of representatives,
id. § 48-2381, and its property and bonds are immune from taxation, *id.* § 48-2302.

24 ¹⁰ In *Driscoll v. City of New York*, the court held that local governments are entitled to
 25 immunity from damages under state antitrust law claims because to hold otherwise
 26 “would be an obstacle to the accomplishment of the goals of Congress.” No. 82 Civ.
 27 8497, 1987 WL 26799, at *2 (S.D.N.Y. Nov. 25, 1987). The Ninth Circuit and Arizona’s
 28 courts have not addressed the issue, but no political subdivision or municipality has ever
 been subject to antitrust damages under Arizona’s antitrust law.

¹¹ *See also Ariz. Corp. Comm’n v. Super. Ct. In & For Maricopa Cnty.*, 107 Ariz. 24, 27
 (1971) (“we hold that ratemaking is a legislative function”); *Am. Microsys., Inc. v. City of
 Santa Clara*, 137 Cal. App. 1037, 1042 (Ct. App. 1982) (“rate fixing” by public utility “is

1 rates set by the District's Board—a legislative function by a public utility. The District is
 2 therefore absolutely immune from damages under § 12-820.01.

3 In the alternative, the District's rate-setting is immune as an “exercise of an
 4 administrative function involving the determination of fundamental governmental
 5 policy.” A.R.S. § 12-820.01(2). Under § 12-820.01(2), a public entity's “determination
 6 ... to seek ... the resources necessary for ... (b) [t]he construction or maintenance of
 7 facilities” is recognized expressly as a “fundamental governmental policy.” *Id.* § 12-
 8 820.01(B). The District's E-27 plan was implemented to cover the fixed costs of
 9 maintaining the electrical grid so that the District can provide electricity and water to
 10 hundreds of thousands of customers. The E-27 plan thus qualifies as a “fundamental
 11 governmental policy.” *See Myers v. City of Tempe*, 212 Ariz. 128, 130 (Ariz. 2006)
 12 (administrative decision that “involved ... the distribution of resources and assets, and
 13 required consulting the city's subject matter experts” was immune). Consequently,
 14 SolarCity's state law damage claims should be dismissed under § 12-820.01.

15 **C. SolarCity's Failure To Comply With The Notice Of Claim Statute
 16 Compels Dismissal Of Its State Law Claims**

17 Because the District is a “public entity” under Arizona law, SolarCity was
 18 required to comply with Arizona's notice of claim statute, A.R.S. § 12-821.01, before
 19 initiating any state law claim for damages against the District. To comply with the
 20 statute, a notice of claim must provide the “*specific amount* for which the claim[s] can be
 21 settled and the facts supporting that amount.” A.R.S. § 12-821.01(A) (emphasis added);
 22 *see also Yollin v. City of Glendale*, 219 Ariz. 24, 28 (App. 2008) (“[T]he first statutory
 23 requirement is that the notice of claim contain an amount for which the claim can be
 24 settled”). The notice of claim statute “unmistakably instructs claimants to include a
 25 particular and certain amount of money that ... will settle the claim.” *Deer Valley*

26
 27
 28 a legislative function”); *Earle M. Jorgensen Co. v. City of Seattle*, 665 P.2d 1328, 1331
 (Wash. 1983) (“municipality's setting of rates is a legislative act”).

1 *Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, 296 (Ariz. 2007). A demand subject
 2 to “qualifying language” does not satisfy the statute. *Id.* at 295-96.

3 SolarCity’s notice, (RJN Ex. 10), served on March 24, 2015, does not comply with
 4 the notice of claim statute. As stated in the District’s response, (RJN Ex. 11, at 4),
 5 SolarCity’s notice did not identify a “particular and certain amount of money” it would
 6 accept to settle its claims. *See Deer Valley*, 214 Ariz. at 296. Rather, SolarCity’s notice
 7 states that it “is not willing to settle damages independent of [the District’s] consent to
 8 cease and desist from the business practices at issue … in a manner enforceable by court
 9 injunction or contempt proceedings.” (RJN Ex. 10, at 2.) By conditioning its settlement
 10 offer on the District accepting its ambiguous demand for injunctive relief, SolarCity
 11 failed to state a “specific amount” for which its damages claims could be settled. The
 12 failure to comply with the notice of claim statute cannot be cured because the 180-day
 13 deadline has passed.¹² SolarCity’s state law damages claims must therefore be dismissed.
 14 *Deer Valley*, 214 Ariz. at 295-96.

15 **II. THE DISTRICT IS IMMUNE FROM ANTITRUST LIABILITY UNDER
 16 THE STATE ACTION IMMUNITY DOCTRINE**

17 The state action doctrine provides states with immunity from antitrust liability.¹³
 18 *FTC v. Phoebe Putney Health Sys., Inc.*, --- U.S. ---, 133 S. Ct. 1003, 1010 (2013). This
 19 immunity extends to a state’s political subdivisions, like the District, where the
 20 challenged conduct is undertaken pursuant to a “clearly articulated and affirmatively
 21 expressed state policy” to displace competition. *Phoebe Putney*, 133 at 1010-1011; *Town
 22 of Hallie v. City of Eau Claire*, 471 U.S. 34, 39 (1985). A state legislature “need not
 23 expressly state in a statute or its legislative history that the legislature intends for the

24
 25 ¹² See FAC ¶¶ 17, 89, 107, 116, 120(b), 123, 124, 203, 204, 211 and 212 (establishing
 26 SolarCity’s state law damages claims accrued no later than December 12, 2014).

27 ¹³ Importantly, the state action doctrine provides “immunity from suit and not just from
 28 judgment … to spare state officials the burdens and uncertainties of the litigation itself as
 well as the cost of an adverse judgment.” *Acoustic Sys., Inc. v. Wenger Corp.*, 207 F.3d
 287, 296 (5th Cir. 2000). Consequently, state action immunity presents a question of law
 appropriately resolved at the outset of a case.

1 delegated action to have anticompetitive effects.” *Id.* at 34. Nor must the legislature
 2 expressly permit the challenged conduct. *S. Motor Carriers Rate Conf., Inc. v. United*
 3 *States*, 471 U.S. 48, 63 (1985). Instead, the clear articulation requirement is satisfied so
 4 long as anticompetitive effects are the “foreseeable result” of conduct that the state
 5 authorizes. *Phoebe Putney*, 133 S. Ct. at 1011 (quoting *Town of Hallie*, 471 U.S. at 42
 6 (1985)); *Shames v. Cal. Travel & Tourism Comm’n*, 626 F.3d 1079, 1084 (9th Cir. 2010)
 7 (“real question” is whether “alleged anticompetitive conduct was a foreseeable result” of
 8 state authorization).¹⁴

9 Since statehood, Arizona’s clearly articulated policy, which is expressed in the
 10 Arizona Constitution and statutes, has been to displace unfettered competition with an
 11 elaborate regulatory structure. Pursuant to the Arizona Constitution, the regulation of
 12 electric utilities is a shared function between the Arizona Corporation Commission
 13 (“ACC”) and the Arizona Legislature. The ACC has exclusive jurisdiction over Arizona’s
 14 private utilities operated by public service corporations and cooperatives, Ariz. Const.
 15 Art. 15, §1, and the Arizona Legislature has jurisdiction over public power entities,
 16 including the District. *See State v. Tucson Gas, Electric Light & Power Company*, 15
 17 Ariz. 294 (Ariz. 1914); *Rubenstein Const. Co. v. Salt River Project Agr. Imp. & Power*
 18 *Dist.*, 76 Ariz. 402, 404 (Ariz. 1953).

19 Retail electric rates in Arizona are not determined by competition. The regulatory
 20 framework governing the retail sale of electricity in Arizona is extensive. *See Ariz.*
 21 *Const. Art. 15, § 3* (constitutionally mandating regulation and stating that the ACC
 22 “shall, prescribe just and reasonable rates and charges to be made and collected, by

23
 24 ¹⁴ Private entities must satisfy a second element before their conduct is immunized as
 25 state action: active supervision. *United Nat. Maint. Inc. v. San Diego Convention Ctr.*,
 26 *Inc.*, 766 F.3d 1002, 1009 (9th Cir. 2014). However, the District, as a public, local
 27 government entity, is not required to show that the challenged conduct is actively
 28 supervised. *North Carolina State Bd. of Dental Examiners v. FTC*, 135 at 1101, 1112
 (2015) (no active supervision requirement where political subdivision has “electorally
 accountable” leadership because “there is little or no danger that it is involved in a private
 price-fixing arrangement”).

1 public service corporations . . .") (emphasis added); Ariz. Admin. Code, § 14-2
2 (comprehensive rules governing public service corporations); A.R.S. § 30-801 *et seq.*
3 (Electric Power Competition Act ("EPCA")); and § 48-2301 *et seq.* To effectuate the
4 regulation of public power entities, the Legislature enacted statutes that establish local
5 governing bodies, including the District's Board, and prescribe the process by which rates
6 shall be set. *See* A.R.S. § 48-2301 *et seq.* and A.R.S. § 30-801 *et seq.* (setting forth the
7 Legislature's delegation of authority to the District). Where, as here, the challenged
8 conduct is both authorized by the state and the foreseeable, logical result of the state's
9 clearly articulated policy, state action immunity warrants dismissal.¹⁵

A. Regulation Of The Electric Industry Continued During Arizona's Brief Exploration Of Competitive Generation

In the mid-1990s, the ACC promulgated a new regulatory framework that would move Arizona's electric industry from a vertically integrated industry (*i.e.*, one utility provides generation, transmission and distribution service) to a structure where properly certified "electric service providers" ("ESP") could compete in the limited areas of generation and related services, such as metering and billing. *Phelps Dodge Corp. v. Ariz. Elec. Power Co-op., Inc.*, 207 Ariz. 95, 100-101, ¶ 1 (App. 2004), as amended on denial of reconsideration (Mar. 15, 2004); Ariz. Admin. Code, §14- 2 -16 ("Electric Competition Rules" ("Rules")).¹⁶ However, the other aspects of Arizona's electric industry, distribution and transmission, would remain closed to competition and continue as a regulated monopoly. *Id.*

22 In 1998, the Legislature enacted the EPCA as a companion to the ACC's Rules.
23 The EPCA was intended to establish "a framework" for regulated competition in retail
24 electric generation. 1998 Ariz. Sess. Laws, Ch. 209, § 35 (directing public power entities

¹⁵ State action immunity also bars SolarCity's state-law antitrust claims. See *Mothershed v. Justices of the Sup. Ct.*, 410 F.3d 602, 609 (9th Cir. 2005).

¹⁶ For example, an ESP was required to file a proposed tariff stating the “maximum” and “minimum” rates to be charged for a particular service. *Phelps Dodge Corp.*, 207 Ariz. at 101, ¶ 5, 102, ¶ 9. In addition, the competitive services the ESP could provide were limited to a “prescribed geographical area.” *Id.* at 101, ¶ 5.

1 to coordinate with the ACC to “ensure an orderly transition to a competitive market in the
 2 retail sale of electricity.”). Consistent with these objectives, the EPCA added numerous
 3 regulations governing public power entities’ generation, transmission, and distribution
 4 services. *See e.g.* A.R.S. §§ 30-803(B), -804 and -805(A), (E) and (F) (mandating that
 5 public power entities continue to exclusively control distribution within their existing
 6 service territories); A.R.S. § 30-806(I) (requiring public power entities to be “supplier of
 7 last resort” for electric generation service if other electricity suppliers are unwilling or
 8 unable to supply electric generation service); and A.R.S. § 30-802(B) (setting forth a
 9 step-by-step, public procedure for adopting “terms and conditions” for electric generation
 10 services). Further, the Legislature required the governing bodies of public power entities
 11 to establish terms and conditions for generation service pursuant to a public process,
 12 subject to rehearing and judicial review. A.R.S. §§ 30-802(B), 30-810 to -812.¹⁷

13 B. Competition In Retail Electric Generation Does Not Exist In Arizona

14 Competition in the area of retail electric generation does not exist in Arizona. In
 15 *Phelps Dodge*, the Arizona Court of Appeals held that aspects of the ACC’s Rules
 16 violated the Arizona Constitution. 207 Ariz. at 108, ¶ 39. The court held that the
 17 Arizona Constitution’s “fair value” provision required the ACC to set retail electric rates
 18 so as to “provide for the needs of all whose interests are involved,” and that competitively
 19 set rates, as proposed in the ACC Rules, could not fulfill that mandate. *Id.*

20 Since *Phelps Dodge*, the ACC has declined to allow any retail electric
 21 competition, including in the District’s service area. *See 2010 Staff Report* Dkt. Nos. E-
 22 00000A-02-0051 & E-00000A-01-0630 (“the *Phelps Dodge* decision largely halted the
 23
 24

25
 26¹⁷ Notably, SolarCity does not, and cannot, allege anticompetitive effect on the retail
 27 electric generation market established by the EPCA. SolarCity does not contend that it is
 28 an “electricity supplier” or that it engages in “electricity generation” or “other services”
 as defined in A.R.S. § 30-801. FAC ¶ 93 (conceding the EPCA does not apply to self-
 generation). Therefore, A.R.S. § 30-813 is not implicated by SolarCity’s claims.

1 movement to ... provide for retail electric competition") (RJN Ex. 5, at 1).¹⁸ In 2013, the
 2 ACC opened a docket to reexamine whether Arizona should pursue restructuring of the
 3 electric industry.¹⁹ After receiving comments from many interested parties, the ACC
 4 voted 4 to 1 to close the docket and ended the inquiry into electric industry
 5 restructuring.²⁰ As a result, no firms—including SolarCity—are certified to compete
 6 with the District. This alone satisfies the state action immunity doctrine's clear
 7 articulation requirement. *See Cal. CNG v. S. Cal. Gas Co.*, 96 F.3d 1193, 1198 (9th Cir.
 8 1996) (where legislature has left to the regulatory body the decision of whether to allow
 9 competition, unless and until the regulator allows for competition “any activity” by the
 10 utility was immune).²¹

11 **C. The Anticompetitive Effects Alleged By SolarCity Are A Foreseeable
 12 Result Of Arizona's Existing Regulatory Scheme**

13 SolarCity contends that the District's rate setting pursuant to A.R.S. §§ 30-802 and
 14 48-2334 has had anticompetitive effects on the rooftop solar industry. However, even if
 15 presumed true, the alleged anticompetitive effects are the logical, foreseeable result of
 16 Arizona's regulatory scheme governing the electric industry. *S. Motor Carriers Rate
 17 Conf.*, 471 U.S. at 65.²²

18 ¹⁸ Only those companies “certificated by the commission” may compete in the District's
 19 service area. A.R.S. § 30-803(A). The *Phelps Dodge* decision revoked all of the
 20 certificates that the ACC had issued to that point. 207 Ariz. at 129.

21 ¹⁹ Jodi Jerich, Memorandum Directing Opening of Docket, ACC Dkt. No. E-00000W-13-
 22 0135, May 14, 2013 (RJN Ex. 6).

23 ²⁰ Jodi Jerich, Memorandum Directing Administrative Closure of this Docket, ACC Dkt.
 24 No. E-00000W-13-0135, Sept. 24, 2013 (RJN Ex. 7).

25 ²¹ *See also Trigen-Okla. City Energy Corp. v. Okla. Gas & Electric Co.*, 244 F.3d 1220,
 26 1226 (10th Cir. 2001) (grant of authority to state corporation commission to “regulate
 27 public utilities” illustrated state's “intent to displace competition”); *cf. Chugach Elec.
 28 Ass'n v. Regulatory Comm'n of Alaska*, 49 P.3d 246, 252 n.18 (Alaska 2003) (state law
 requiring certificate of convenience and necessity from state commission before
 competing in electric utility market immunizes utilities that have received certificate).

²² *See also Nugget Hydroelectric L.P. v. Pac. Gas & Elec. Co.*, 981 F.2d 429, 434 (9th
 Cir.1992) (alleged anticompetitive conduct was foreseeable result of regulatory authority
 granted to California public utility commission to specify “prices, terms and conditions”
 for sale of power); *Metro Mobile CTS, Inc. v. Newvector Comm'n's, Inc.*, 661 F. Supp.

1 Within the regulatory structures of Titles 30 and 48, A.R.S., the Board is required
 2 to set rates and to promulgate rules and regulations. A.R.S. §§ 30-802 and 48-2334.²³
 3 No “electricity supplier” in Arizona is free to set its own rates without regulatory
 4 oversight and in no case are rates set by competition. Anticompetitive effects foreseeably
 5 result from this regulatory regime. *Metro Mobile CTS, Inc.*, 661 F. Supp. at 1509-1510
 6 (holding that “[t]he directive to the ACC to determine just and reasonable rates and
 7 charges falls squarely within the analysis of *Southern Motor Carriers*” because “by
 8 definition, just and reasonable rates are set by regulatory agency, not by the market.”).
 9 That the Legislature anticipated its regulatory scheme for public power entities would
 10 have anticompetitive effects is clearly articulated in A.R.S. § 48-247, which exempts the
 11 District from Arizona’s antitrust laws. *McCallum v. City of Athens*, 976 F.2d 649, 655
 12 (11th Cir. 1992) (stating that similar Georgia statute “unequivocally revealed that it
 13 contemplated that its municipalities might engage in anticompetitive conduct”).

14 The provisions of the EPCA that were designed to facilitate a transition to
 15 competition in retail electric generation do not change the analysis under the state action
 16 immunity doctrine. A state policy need not compel anticompetitive activity to establish a
 17 state policy favoring regulation, nor is it required that the state policy prohibit
 18 competition. The “federal antitrust laws do not forbid the States to adopt policies that
 19 permit, but do not compel, anticompetitive conduct by *regulated* private parties.” *S.*
 20 *Motor Carriers*, 471 U.S. at 60 (emphasis in original). Statutes designed to “achieve the
 21 desired balance” between regulation and competition are sufficient to support state action
 22 immunity “as long as the State as sovereign clearly intends to displace competition in a

23 1504, 1515-16 (D. Ariz. 1987) *aff’d*, 892 F.2d 62 (9th Cir. 1989) (“As long as an agency
 24 is under the mandate of a sovereign state to establish just and reasonable rates, and retains
 25 discretion as to how those rates will be determined, the method by which it establishes
 26 those rates is, and remains, regulation, even if one of the factors used in determining the
 27 just and reasonable rates is the effect of competition.”).

28 ²³ Granting the District the right to set its own prices while the State was aware that the
 District was a monopoly suffices for clear articulation purposes. *Grason Elec. Co. v.*
Sacramento Util. Dist., 770 F.2d 833, 838 (9th Cir. 1985); *Hayes v. Shelby Cty. Trustee*,
 971 F. Supp. 2d 717, 736 (W.D. Tenn. 2013).

1 particular field with a regulatory *structure....*” *Id.* at 59, 64 (emphasis added.); *Metro*
 2 *Mobile CTS, Inc.*, 661 F. Supp. at 1514 (“a state regulatory scheme need not be
 3 antithetical to competition to be exempt from federal antitrust scrutiny”).

4 The EPCA created a regulatory “framework” within which public power entities
 5 were to cooperate with the ACC in regulating limited competition in retail electric
 6 generation. *See* 1998 Ariz. Sess. Laws, Ch. 209, § 38 (recognizing possibility the ACC
 7 would delay or suspend efforts in connection with competition in retail generation and
 8 authorizing public power entities to suspend A.R.S. § 30-803(A)). However, the EPCA
 9 did not depart from Arizona’s long-existing practice of the ACC and the local governing
 10 bodies regulating the electric industry. *See* A.R.S. § 30-802(A)

11 Moreover, the EPCA clearly articulates a policy of continued regulation of
 12 monopolies in all other aspects of the electric industry, including distribution,
 13 transmission, and the supplier of last resort obligation. The Legislature expressly
 14 selected regulation over competition in these areas to ensure “system safety, reliability,
 15 environmental protection and fair access for all” and “sufficient supplies of electricity
 16 and an adequate transmission and distribution system will be available to serve the
 17 citizens and business of this state,” as these policies were deemed matters of “utmost
 18 importance.” 1998 Ariz. Sess. Laws, Ch. 209, § 35; *see also* A.R.S. §§ 30-803(B), -
 19 805(A)(1) and -806(I). The District is expressly authorized to adopt terms and conditions
 20 to accomplish these goals. The logical foreseeable result of the Legislature’s choice is
 21 that the District’s acts in these areas might have anticompetitive effects. *See* A.R.S. § 48-
 22 247; *Town of Hallie*, 471 U.S. at 42 (clear articulation requirement satisfied where the
 23 municipality was given broad authority to regulate); *City of Columbia v. Omni Outdoor*
 24 *Advert., Inc.*, 499 U.S. 365, 370 (1991) (statute that authorized city to adopt regulations
 25 for the “purpose of promoting health, safety, morals or the general welfare of the
 26 community” satisfied clear articulation requirement); *New Motor Vehicle Bd. of Cal. v.*
 27 *Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978) (finding clear articulation where regulatory
 28

1 scheme was “designed to displace unfettered business freedom”). State action immunity
 2 therefore bars SolarCity’s antitrust claims.

3 **III. THE FILED-RATE DOCTRINE BARS ALL OF SOLAR CITY’S CLAIMS**

4 The filed-rate doctrine forbids a court from revising a utility’s rate where that rate
 5 has been approved by the utility’s governing body.²⁴ *See Ark. La. Gas Co. v. Hall*, 453
 6 U.S. 571, 577 (1981) (doctrine applies to rates that are reviewed by “the appropriate ...
 7 regulatory authority.”); *see E. & J. Gallo Winery.*, 503 F.3d at 1040. At the doctrine’s
 8 core is an awareness that courts “are not institutionally well suited to engage in
 9 retroactive rate setting.” *Wegoland Ltd. v. NYNEX, Inc.*, 27 F.3d 17, 19 (2d Cir. 1994);
 10 *Pub. Util. Dist. No. 1 of Grays Harbor Cnty. Wash. v. IDACORP Inc.*, 379 F.3d 641, 650-
 11 51 (9th Cir. 2004) (courts may not substitute their own views of reasonableness regarding
 12 regulated rates).

13 In the Ninth Circuit, “[t]he filed rate doctrine has been given an expansive reading
 14 and application.” *Carlin v. DairyAmerica, Inc.*, 705 F.3d 856, 868 (9th Cir. 2013). The
 15 filed rate doctrine provides “fortification against direct attack [of regulated rates and] is
 16 impenetrable. It turns away both federal and state antitrust actions ... [and] ... state tort
 17 actions.” *Wah Chang v. Duke Energy Trading & Mktg., LLC*, 507 F.3d 1222, 1225 (9th
 18 Cir. 2007).

19 All of SolarCity’s claims challenge rates set pursuant to the District Board’s
 20 regulatory authority under Titles 30 and 48 of the A.R.S. The filed-rate doctrine
 21 therefore bars them completely. The rates at issue were considered and approved by the
 22 Board. Pursuant to state law, there was a notice and comment period, public hearings (in
 23 which SolarCity participated vigorously), a vote, and an opportunity to challenge the
 24 Board’s decision in state court—the *only* mechanism allowed for reconsideration of the
 25 District’s rates as a matter of state law (which SolarCity elected not to pursue). A.R.S. §§
 26

27

 28 ²⁴ The name “filed rate” is a misnomer, as there is no requirement that a rate literally be
 “filed” for immunity to attach. *See E. & J. Gallo Winery v. Encana Corp.*, 503 F.3d 1027,
 1040 (9th Cir. 2007).

1 30-810 to 30-812. Collateral judicial review of the Board's decision clearly "infringe[s]
 2 upon [the Board's] power to set rates" and thus is prohibited. *Smith v. Sprint Commc'n's*
 3 Co., No. C 96-2067, 1996 WL 1058204, at *3 (N.D. Cal. Sept. 13, 1996).²⁵

4 All counts of SolarCity's FAC ask the Court to reverse the rate set by the
 5 District's Board for its self-generation customers, and thereby increase the rates of all of
 6 the District's other customers—precisely the kind of relief the filed-rate doctrine was
 7 created to prohibit. The FAC therefore must be dismissed.

8 **IV. SOLARCITY'S CLAIMS ARE BARRED IN THEIR ENTIRETY BY THE
 9 NOERR-PENNINGTON DOCTRINE**

10 SolarCity's FAC must also be dismissed in its entirety under the *Noerr-*
 11 *Pennington* doctrine ("Noerr"). *Noerr* extends absolute immunity where alleged
 12 "monopolization is the result of valid governmental action." *Allied Tube & Conduit*
 13 *Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 (1988). SolarCity challenges the Board's
 14 decision regarding the appropriate rates to charge retail electric customers. That decision
 15 was made in direct response to petitioning from District management for a rate change,
 16 and made only after the elected Board modified management's proposal during the
 17 course of the public proceeding. *See* FAC ¶¶ 89, 97. Because SolarCity's alleged
 18 injuries result solely from government action in response to valid petitioning, its suit must
 19 be dismissed. *See Joor Mfg.*, 17 F.3d at 300-02.

20 Immunity is not lost because the petitioning at issue was initiated by the
 21 management of a public entity. The Ninth Circuit has held that *Noerr* extends to
 22 petitioning by government officials and other employees of public entities. *See Manistee*
 23 *Town Ctr. v. City of Glendale*, 227 F.3d 1090, 1092-94 (9th Cir. 2000). If anything,
 24 *Noerr* immunity for government officials carries with it the additional safeguard that

25 The filed rate doctrine bars injunctive relief in addition to damages where—as is true
 26 here—such relief would necessarily require an adjustment to the set rate. *See Pub. Util.*
Dist. No. 1 of Snohomish Cnty. v. Dynegy Power Mktg., Inc., 384 F.3d 756, 761 (9th Cir.
 27 2004) ("injunctive relief ... [is] barred by the filed rate doctrine"); *McLeod USA*
Telecomms. Servs. v. Ariz. Corp. Comm'n, 655 F. Supp. 2d 1003, 1009-11 (D. Ariz. 2009)
 28 (doctrine barred suit seeking injunctive relief).

1 “elected officials have political checks on their actions that private petitioners do not
 2 face.” *Id.* at 1094. So it is here, where the Board members are politically accountable to
 3 the District electorate.²⁶ *Noerr* bars not only SolarCity’s state and federal law antitrust
 4 claims, but also its state law tort claims. *See, e.g., Joor Mfg.*, 17 F.3d at 301-02.

5 **V. SOLARCITY HAS NOT AND CANNOT ALLEGE ANTITRUST INJURY
 6 AND THEREFORE LACKS STANDING**

7 Not every party alleging injury arising from a violation of the antitrust laws has
 8 standing to bring suit: “Only those who meet the requirements for ‘antitrust *standing*’
 9 may pursue a claim under the Clayton Act; and to acquire ‘antitrust standing,’ a plaintiff
 10 must adequately allege and eventually prove ‘*antitrust injury*.’” *Glen Holly Ent., Inc. v.
 11 Tektronix Inc.*, 343 F.3d 1000, 1007 (9th Cir. 2003) (second emphasis added). A
 12 plaintiff’s failure to adequately allege antitrust injury compels dismissal under Fed. R.
 13 Civ. P. 12(b)(6). *Somers v. Apple, Inc.*, 729 F.3d 953, 962 (9th Cir. 2013).

14 To establish antitrust injury, the Ninth Circuit requires, *inter alia*, “that ‘the
 15 injured party be a participant in the same market as the alleged malefactors,’ meaning
 16 ‘the party alleging the injury must be either a consumer of the alleged violator’s goods or
 17 services or a competitor of the alleged violator in the restrained market.’” *Somers*, 729
 18 F.3d at 963 (citing *Glen Holly*, 343 F.3d at 1008); *see also Vinci v. Waste Mgmt., Inc.*, 80
 19 F.3d 1372, 1376 (9th Cir. 1996) (“plaintiff who is neither a competitor nor a consumer in
 20 the relevant market does not suffer antitrust injury.”) (internal quotation marks omitted).

21 SolarCity does not claim injury as a customer of the District. And, while
 22 SolarCity asserts in its FAC that it “directly competes with SRP in the retail market
 23 because SolarCity offers equipment and services that provide electricity—specifically
 24 solar-generated electricity—to customers,” FAC ¶ 50, this conclusory assertion is false as
 25

26 Moreover, because SolarCity’s FAC clearly involves the right to petition governmental
 27 bodies under *Noerr*, it was required to satisfy a “heightened pleading standard” that
 28 “include[s] allegations of the specific activities” which bring “the defendant’s conduct
 into one of the exceptions to *Noerr-Pennington* protection.” *Or. Nat. Res. Council v.
 Mohla*, 944 F.2d 531, 533 (9th Cir. 1991). SolarCity’s FAC contains no such allegations.

1 a matter of law and is contradicted by SolarCity's own statements to the ACC and, more
 2 recently, to the Maricopa County Superior Court.²⁷

3 First, to supply retail electricity in Arizona, a company must "obtain a certificate"
 4 from the ACC. A.R.S. §§ 30-803(A), 40-207(A). SolarCity has not applied for, much
 5 less obtained such a certificate. As SolarCity itself admits: "specific rules adopted by the
 6 Arizona Corporation Commission—which regulates companies that produce and sell
 7 electricity directly to consumers—expressly prohibit [SolarCity] from doing so."²⁸
 8 SolarCity is therefore prohibited as a matter of law from competing with the District to
 9 supply retail electricity. *See Barton & Pittinos, Inc. v. SmithKline Beecham Corp.*, 118
 10 F.3d 178, 180 (3d Cir. 1997) (Alito, J.) (plaintiff not a competitor in relevant market
 11 because it "lacked the required [regulatory] license); *Ethypharm S.A. France v. Abbott*
 12 *Labs.*, 707 F.3d 223, 235-36 (3d Cir. 2013) (plaintiff "does not and indeed cannot
 13 compete with [defendant]" because "[i]t did not ... receive the required FDA approval").

14 Second, in a 2009 regulatory proceeding before the ACC—initiated by
 15 SolarCity—SolarCity argued that it does not supply retail electricity in Arizona. As part
 16 of that proceeding, SolarCity submitted the written testimony of its CEO, Lyndon Rive,
 17 who responded to the very question raised by the Ninth Circuit's test:

18 **6. Does SolarCity compete against public service corporations?** No. ... The
 19 systems that SolarCity finances and installs do not replace the customer's need for
 20 service from their traditional utility. SolarCity offers a *completely different set of*
products and services than a traditional public service corporation.²⁹

21 While the District and others argued that SolarCity should be regulated, SolarCity
 22 prevailed and the ACC found that SolarCity does not furnish electricity in Arizona. *See*
 23 Decision No. 71795, Docket E-20690A-09-0346 (July 12, 2010) (RJN Ex. 4). SolarCity

24
 25 ²⁷ The Court need not assume the truth of legal conclusions like SolarCity's claim that it
 26 competes in the relevant market. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009).

26
 27 ²⁸ *SolarCity v. Ariz. Dep't of Revenue*, Verified Complaint ¶ 5 ("SolarCity Compl."), No.
 28 TX 2014-00129 (Ariz. Super. Ct. June 30, 2014) (RJN Ex. 1).

28
 29 Notice of Filing of Applicant, SolarCity's Pre-Filed Witness Testimony and Exhibits,
 Docket E-20690A-09-0346 (Aug. 24, 2009), Testimony of Lyndon Rive (Aug. 20, 2009)
 (RJN Ex. 3, at 8) (emphasis added).

1 cannot have it both ways. It therefore should be judicially estopped from claiming to
 2 compete with the District.³⁰

3 Furthermore, as recently as April 2015, *after* the initiation of this lawsuit,
 4 SolarCity reaffirmed that it does not compete in the sale of retail electricity, when it
 5 asserted to the Maricopa County Superior Court: “Simply put, there is no issue as to
 6 whether either of the Plaintiffs [SolarCity and SunRun] ‘compete’ with local utilities *in*
 7 *any sense of that word.*”³¹

8 Third, SolarCity’s assertion that it “directly competes with [the District] in the
 9 retail market because SolarCity offers equipment and services that provide electricity—
 10 specifically solar power—to customers” is internally inconsistent. FAC ¶ 50. SolarCity
 11 no more competes with the District to supply power through its sale of solar panels than
 12 do companies that manufacture and supply wind turbines, hydroelectric dams, or gasoline
 13 generators. By its own account, SolarCity sells equipment, not retail electricity.³²

14 Further, SolarCity’s purported “injury” fails to give it standing. The claimed
 15 injury is that SolarCity now sells and leases fewer rooftop solar panels because of the
 16 District’s SEPPs. But this purported injury to SolarCity’s bottom line is not an allegation
 17 of harm to competition. *See, e.g., Pool Water Prods. v. Olin Corp.*, 258 F.3d 1024, 1035-
 18 36 (9th Cir. 2001) (“reduced profits ... and decreased market share” from allegedly
 19 anticompetitive acts “is not the type of harm ... antitrust laws were meant to protect
 20 against”). There is no requirement in the antitrust laws or otherwise that the District
 21 establish its rates in a manner that aids SolarCity’s sales.

22

23 ³⁰ To apply judicial estoppel, courts consider (1) whether “a party’s later position [is]
 24 ‘clearly inconsistent’ with its earlier position”; (2) “whether the party has succeeded in
 25 persuading a court to accept that party’s earlier position”; and (3) “whether the party
 26 seeking to assert an inconsistent position would derive an unfair advantage or impose an
 27 unfair detriment on the opposing party if not estopped.” *Hamilton v. State Farm Fire &*
 28 *Cas. Co.*, 270 F.3d 778, 782-83 (9th Cir. 2001). Here, all three favor judicial estoppel.

³¹ *SolarCity v. Ariz. Dep’t of Revenue*, No. TX2014-000129, Plaintiffs’ Controverting
 Statement of Facts (Ariz. Super. Ct., T.C. Apr. 9, 2015) (emphasis added) (RJN Ex. 2, at
 15-16, ¶ 70).

³² *See* FAC ¶ 3.

VI. SOLARCITY FAILS TO STATE A CLAIM UNDER STATE OR FEDERAL ANTITRUST LAW

A. SolarCity's Failure To Adequately Plead Relevant Markets Requires Dismissal Of All Of Its State And Federal Antitrust Claims

4 Each antitrust claim requires SolarCity to plead a plausible relevant product
5 market in which the conduct at issue took place.³³ Failure to do so requires dismissal.
6 *Tanaka*, 252 F.3d at 1063. A properly alleged antitrust product market must be defined
7 in more than conclusory terms: “where the plaintiff fails to define its proposed relevant
8 market with reference to the rule of reasonable interchangeability and cross-elasticity of
9 demand, ... the relevant market is legally insufficient and a motion to dismiss may be
10 granted.” *POURfect Prods. v. KitchenAid*, No. 09-cv-2660, 2010 WL 1769413, at *4 n.1
11 (D. Ariz. May 3, 2010); *Tanaka*, 252 F.3d at 1063.

12 SolarCity alleges the relevant product market to be the retail market for “the
13 provision of electric power to end-use residential, governmental, and business
14 consumers.” FAC ¶ 49. It posits that, in this alleged market, “power may be provided by
15 various sources, such as through the outright sale of power, or by the lease or sale of
16 distributed systems through which a customer generates power on his or her own
17 property.” *Id.* A retail electricity market that includes self-generated power *and*
18 equipment suppliers to self-generating customers is facially implausible.

19 As explained above, SolarCity does not supply retail electricity. It supplies
20 *equipment* (and financing for that equipment) that can generate electricity during certain
21 times of the day under certain conditions, *i.e.*, when the sun shines. FAC ¶ 70. Thus,
22 accepting SolarCity's unsustainable view of the market, *any* supplier of *any* equipment
23 used to generate electricity would be included.

24 Moreover, the FAC does not, because it cannot, allege that the equipment
25 SolarCity sells is reasonably interchangeable with retail electricity. *See Grason Elec. Co.*

²⁷ ³³ See *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001) (Sherman Act § 1);
²⁸ *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458-459 (1993) (Sherman Act § 2);
Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961) (Clayton Act § 3).

1 *v. Sacramento Mun. Util. Dist.*, 571 F. Supp. 1504, 1522 (E.D. Cal. 1983) (alternative
 2 forms of energy not interchangeable with electricity). And several allegations contend
 3 just the opposite. For example, FAC ¶ 63 states,

4 Whether SRP customers self-generate power (including through distributed solar
 5 provided by SolarCity) or not, all or virtually all of them still need to purchase
 6 both retail electric power and grid access from SRP to have access to power at
 7 times that alternative sources of power (such as distributed solar) cannot meet the
 8 customers' needs.

9 Consequently, as a matter of law, the two products are not part of the same market. *See*
 10 *Little Rock Cardiology Clinic, P.A. v. Baptist Health*, 573 F. Supp. 2d 1125, 1146 (E.D.
 11 Ark. 2008) (“as a matter of law, complementary products sold separately are not in the
 12 same product market”), *aff’d*, 591 F. 3d 591 (8th Cir. 2009); *Transphase Sys., Inc. v. S.*
 13 *Cal. Edison Co.*, 839 F. Supp. 711, 717-18 (C.D. Cal. 1993) (dismissing monopolization
 14 allegations because plaintiff did not participate in relevant market); Areeda &
 15 Hovenkamp, *Antitrust Law*, ¶ 565a (2014) (complements do not belong in the same
 16 market). And SolarCity does not even attempt to allege cross-elasticity of demand
 17 between electricity supplied by the District and SolarCity’s panels. Cross-elasticity of
 18 demand simply refers to “the extent to which consumers will respond to an increase in
 19 the price of one good by substituting or switching to another,” that is, by increasing their
 20 purchases of the second good. *Mobil Pipe Line Co. v. F.E.R.C.*, 676 F.3d 1098, 1102
 21 (D.C. Cir. 2012). Here, SolarCity alleges the very opposite of cross-elasticity: it claims
 22 that increases in the District’s rates will result in *decreased*, rather than increased,
 23 demand for SolarCity’s panels. FAC ¶ 123.

24 Where, as here, a complaint itself contains allegations that make the alleged
 25 product market implausible—both in terms of reasonable substitutability and cross-
 26 elasticity of demand—it must be dismissed. *See Tanaka*, 252 F.3d at 1063.³⁴
 27

28 ³⁴ SolarCity also does not define its purported “grid access market,” with reference to the
 29 rule of interchangeability and cross-elasticity of demand. *See* FAC ¶ 58.

1 **B. SolarCity's Claims Under Sherman Act § 1, Clayton Act § 3, And**
 2 **A.R.S. § 44-1402 Must Be Dismissed Because SolarCity Has Failed To**
 3 **Adequately Plead An Agreement**

4 SolarCity's claims are also deficient in other respects. "Section 1 of the Sherman
 5 Act does not preclude a party from *unilaterally* determining the parties with whom it will
 6 deal and the terms on which it will transact business." *49er Chevrolet, Inc. v. Gen.*
 7 *Motors Corp.*, 803 F.2d 1463, 1468 (9th Cir. 1986) (emphasis added). Instead a plaintiff
 8 must show "an agreement, conspiracy or combination among two or more persons or
 9 distinct business entities." *Cent. Valley Chrysler-Jeep v. Witherspoon*, 456 F. Supp. 2d
 10 1160, 1186 (E.D. Cal. 2006) (citing *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 811
 11 (9th Cir. 1988)). Similarly, "[e]vidence of an agreement is expressly required under ...
 12 Section 3 of the Clayton Act." *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 270 n.10
 13 (3d Cir. 2012). Failure to plead that a defendant entered into such an illegal agreement
 14 compels dismissal of those claims. *See Supermarket of Homes, Inc. v. San Fernando*
 15 *Valley Bd.*, 786 F.2d 1400, 1405 (9th Cir. 1988).

16 SolarCity attempts to characterize the District's retail rates as "agreements." FAC
 17 ¶ 161. This does not suffice. SolarCity does not allege that the District's rates are the
 18 result of anything other than the District's unilateral pricing decision. A customer's
 19 agreement to pay that price is of no moment under the antitrust laws. If it were, each
 20 District customer would be party to the allegedly unlawful agreement and, therefore, at
 21 least theoretically liable for the challenged conduct. The antitrust laws do not compel
 22 such an absurd result. *See, e.g., Rick-Mik Enters., Inc. v. Equilon Enters., LLC*, 532 F.3d
 23 963, 976 (9th Cir. 2008) ("ordinary sales contract [is] not an illegal antitrust agreement").
 24 Rather, there "can be no liability under § 1" for a single firm's unilateral decision as to
 25 how to set its prices. *Fisher v. City of Berkeley, Cal.*, 475 U.S. 260, 266 (1986).

26 **C. SolarCity Has Failed To Plead Adequately A Tying Arrangement**

27 SolarCity also cannot allege a Section 1 violation by labeling the price that the
 28 District charges its retail customers for electricity an illegal "tying" arrangement. *See*
 29 FAC ¶ 164. A tying arrangement is an "agreement by [the seller] to sell one product but

1 only on the condition that the buyer also purchases a different (or tied) product, or at least
 2 agrees that he will not purchase that product from any other supplier.” *Eastman Kodak*
 3 *Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 461-62 (1992). To state a valid tying
 4 claim, a plaintiff must plausibly plead “that there exist two *distinct* products … in
 5 different markets whose sales are tied together.” *In re Webkinz Antitrust Litig.*, 695 F.
 6 Supp. 2d 987, 993 (N.D. Cal. 2010) (*citing Paladin Assocs., Inc. v. Montana Power Co.*,
 7 328 F.3d 1145, 1159 (9th Cir. 2003)).

8 SolarCity fails to allege adequately two distinct product markets. It provides no
 9 factual allegations to support its naked assertion that there is “separate demand” for grid
 10 access. *See, e.g., Apple, Inc. v. Psystar Corp.*, 586 F. Supp. 2d 1190, 1198 (N.D. Cal.
 11 2008) (antitrust plaintiff must provide “factual basis” in complaint for alleged product
 12 market). As SolarCity acknowledges, its customers purchase the same electricity at retail
 13 from the District as any other District customer. FAC ¶ 63. Indeed, by the FAC’s own
 14 terms, none of the District’s retail customers purchase “grid access” apart from their
 15 demand for retail electric power from the District. *Id.*; *see also City of Cleveland v.*
 16 *Cleveland Elec. Illuminating Co.*, 538 F. Supp. 1306, 1312 (N.D. Ohio 1980) (that access
 17 to wholesale power was important element in competition in retail power market did not
 18 mean that there was a “wholesale power market” separate from retail market); *Grason*
 19 *Elec. Co.*, 571 F. Supp. at 1527 (electricity distribution facilities not a separate market
 20 from retail electricity because “the consumer has no interest in those facilities
 21 independent of the desire to obtain raw electric power”). SolarCity’s failure to plead two
 22 distinct markets requires its tying claim to be dismissed. *See Jefferson Parish Hosp. Dist.*
 23 *No. 2 v. Hyde*, 466 U.S. 2, 21 (1984) (Tying “cannot exist unless two separate product
 24 markets have been linked.”).

25 **D. SolarCity’s State And Federal Monopolization Claims Must Be
 26 Dismissed For Failure To Adequately Plead Anticompetitive Conduct**

27 The antitrust laws recognize that a “single entity … must have the discretion to
 28 determine the prices of the products that it sells.” *Texaco Inc. v. Dagher*, 547 U.S. 1, 7

1 (2006). Thus, “[s]imply possessing monopoly power and charging monopoly prices does
 2 not violate” Sherman Act § 2 (or its state corollary, A.R.S. § 44-1403). *Pac. Bell Tel. Co.*
 3 *v. linkLine Commc’ns, Inc.*, 555 U.S. 438, 447-48 (2009) (citation omitted). “[T]he
 4 possession of monopoly power will not be found unlawful unless it is accompanied by an
 5 element of anticompetitive conduct.” *Trinko*, 540 U.S. at 407; *see also POURfect Prods.*,
 6 2010 WL 1769413, at *5 (granting a rule 12(b)(6) motion because “a monopolist’s act ...
 7 must harm the competitive process and thereby harm consumers, but mere harm to one or
 8 more competitors will not suffice”). SolarCity’s failure to adequately plead
 9 anticompetitive conduct requires dismissal of its monopolization claims. *SmileCare*
 10 *Dental Grp. v. Delta Dental Plan of Cal., Inc.*, 88 F.3d 780, 783 (9th Cir. 1996)
 11 (“anticompetitive conduct” an essential element of attempted monopolization claim).

12 **1. SolarCity Fails To Allege Below-Cost Pricing Or An Antitrust**
Duty To Deal

13 While in certain contexts what constitutes “anticompetitive conduct” can be
 14 challenging to discern, the Supreme Court has established clear standards where—as
 15 here—the conduct at issue arises from a defendant’s pricing. Typically, a company “is
 16 free to charge whatever [] price it would like.” *linkLine*, 555 U.S. at 454. However, in
 17 “rare circumstances, a dominant firm may incur antitrust liability for purely unilateral
 18 conduct.” *Id.* at 439. As the Supreme Court explained in *linkLine*, if a plaintiff contends
 19 that a defendant’s prices are *too low*, it must allege that those prices are below a
 20 reasonable measure of the defendant’s costs. *Id.* at 451. If a plaintiff alleges that a
 21 defendant’s prices are *too high*, the plaintiff must allege that the defendant has an
 22 “antitrust duty to deal” with the plaintiff. *Id.* at 450-51.

23 The FAC does neither. SolarCity does not allege that the District has an “antitrust
 24 duty to deal” with SolarCity. “[A] defendant with no antitrust duty to deal with its rivals
 25 has no duty to deal under the terms and conditions preferred by those rivals.” *Id.* at 457.
 26 Nor does SolarCity allege that the District’s price are below a reasonable measure of its
 27 costs. If anything, SolarCity alleges that the District charges all of its customers well
 28

1 above its costs. In *PeaceHealth*, the Ninth Circuit held that the below-cost pricing test
 2 applies to the evaluation of whether the defendant's "bundled discounts" amounted to
 3 anticompetitive conduct. *See Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883,
 4 903 (9th Cir. 2008). And the only two circuits to have addressed the issue have extended
 5 the price-cost test to the kind of claims alleged by SolarCity: exclusive dealing claims in
 6 which price is the primary method of exclusion. In *ZF Meritor*, the Court held that, "in
 7 the context of exclusive dealing, the price-cost test may be utilized as a specific
 8 application of the 'rule of reason' when the plaintiff alleges that price is the vehicle of
 9 exclusion." 696 F.3d at 273-74; *see also NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 451-52
 10 (6th Cir. 2007) (dismissing Sherman Act § 2 claim where plaintiff conceded defendant
 11 did not engage in below-cost "predatory pricing"); *PNY Techs., Inc. v. SanDisk Corp.*,
 12 Case No. 11-cv-04689-WHO, 2014 WL 2987322, at *6 & nn.9, 10 (N.D. Cal. July 2,
 13 2014) (noting absence of below-cost pricing allegation and dismissing exclusive dealing
 14 claim); *Eisai Inc. v. Sanofi-Aventis U.S., LLC*, Civil Action No. 08-4168 (MLC), 2014
 15 WL 1343254, at *25-30 (D.N.J. March 28, 2014).

16 Accordingly, SolarCity's claim based on exclusive dealing (or any other antitrust
 17 label) must be dismissed based on its failure to allege that the District's rates are priced
 18 below its costs.³⁵

19 **2. At Best, SolarCity Asserts A Price Squeeze Claim, Which The
 20 Supreme Court Has Plainly Rejected As Invalid**

21 The gravamen of the FAC appears to be that the District's price increase for
 22 electricity has made it less attractive for customers to purchase SolarCity's distributed
 23 solar product. *See* FAC ¶¶ 5, 78, 83. SolarCity implies that, on the one hand, the
 24 District's prices for non-solar customers are too low and, on the other, alleges its prices
 25 for self-generation customers are too high. While SolarCity's casual approach to

26 ³⁵ This same analysis applies to SolarCity's exclusive dealing claims under Sherman Act
 27 § 1 and § 2, and Clayton Act § 3. *ZF Meritor*, 696 F.3d at 281. Consequently, the
 28 shortcomings of the FAC identified in this section provide additional reasons that its
 exclusive dealing claims under Sherman Act § 1 and Clayton Act § 3 must be dismissed.

1 pleading its monopolization claims avoids the term, these allegations are the functional
 2 equivalent of a “price squeeze.” Price squeezes typically occur “when a vertically
 3 integrated firm sells inputs at wholesale and also sells finished goods or services at
 4 retail.” *linkLine*, 555 U.S. at 442. SolarCity’s allegations that the District is using some
 5 combination of allegedly too high and too low prices to exclude SolarCity places its
 6 claim squarely within the Supreme Court’s “price squeeze” framework in *linkLine*, and
 7 requires its dismissal.

8 In *linkLine*, the Supreme Court held that plaintiffs asserting a price squeeze claim
 9 must show either that the defendant had a duty to deal at the wholesale level or that its
 10 prices at the retail level were below cost. *Id.* at 457. “In short, there is no independently
 11 cognizable harm to competition when the wholesale price and the retail price are
 12 independently lawful.” *Doe v. Abbott Labs.*, 571 F.3d 930, 934-35 (9th Cir. 2009). In
 13 *Doe v. Abbott Labs.*, the Ninth Circuit dismissed plaintiffs’ “monopoly leveraging”
 14 claims, reasoning that they were the economic equivalent of a price squeeze under
 15 *linkLine*. *Id.* at 935. There, the defendant, Abbott, manufactured a drug called Norvir,
 16 which served as a “booster” to enhance the effectiveness of Abbott’s protease inhibitors
 17 (a type of HIV/AIDS drug). *Id.* at 932. “[T]he alleged vice [was] that Abbott [was]
 18 using its monopoly position in the booster market to raise the price of Norvir while
 19 selling its own boosted inhibitor at too low a price.” *Id.* at 935. The plaintiffs tried to
 20 distinguish *linkLine* on the grounds that they labeled their claim “monopoly leveraging”
 21 instead of a price squeeze. *Id.* at 935. The court rejected this distinction as
 22 “insubstantial,” and held instead that “Abbott’s conduct [was] the functional equivalent
 23 of a price squeeze the [Supreme] Court found unobjectionable in *linkLine*.” *Id.*

24 The allegations here are virtually identical to those the Ninth Circuit found
 25 wanting in *Abbott Labs.* Just as Norvir was alleged to be necessary for Abbott’s
 26 competitors to offer an effective and thus competitive protease inhibitor, *see id.* at 932,
 27 SolarCity’s customers still need electricity from the District. *See* FAC ¶¶ 4, 63. As in
 28 *Abbott Labs.*, the alleged effect of the District’s conduct is “to raise the total cost to the

[customer]” of using distributed solar. 571 F.3d at 932. For example, the FAC alleges that the District’s “rates have made rooftop solar profoundly uneconomical,” ¶ 123; that the District’s price increase is “so significant that it eliminates the economic value to customers of generating their own power,” *id.* ¶ 5; and “that very few, if any, customers will make the economically irrational decision to install distributed solar systems if the result will be to pay a *higher* total amount for power.” *Id.* ¶ 114. At the same time, SolarCity suggests that the District keeps its prices to non-solar customers low, so that all customers are incentivized to purchase all of their power from the District. *See id.* ¶ 12. In short, “the alleged vice is that [the District] is using its monopoly position ... to raise the price of [electricity for self-generators] while selling its own [electricity] at too low a price” for SolarCity to compete. *See Abbott Labs.*, 571 F.3d at 935. The FAC’s allegations are thus the “functional equivalent of [a] price squeeze.” *Id.*

Because the FAC does not allege either that the District has an antitrust duty to deal with SolarCity, or that it has priced retail electricity below its costs, SolarCity’s monopolization and attempted monopolization claims must be dismissed.³⁶

VII. SOLARCITY’S STATE LAW CLAIMS ARE BARRED PURSUANT TO A.R.S. § 30-810

SolarCity failed to file a request for a rehearing before bringing its state law claims pursuant to A.R.S. § 301-810(B). This statute provides that “no claim arising from any ... decision of the [Board] ... shall accrue in any court... unless the party ... makes ... application to the [District] for a rehearing.” The rehearing requirement in A.R.S. § 30-810 mirrors A.R.S. § 40-253, which requires an application for a rehearing before bringing a claim arising from a decision by the ACC.³⁷ Arizona law is clear that a party that fails to

³⁶ *See also NicSand*, 507 F.3d at 451-52 (dismissing § 2 claim where plaintiff conceded defendant “did not engage in any form of predatory pricing”); *PNY Techs.*, 2014 WL 2987322, at *6 & nn.9, 10 (noting absence of below-cost pricing allegation and dismissing exclusive dealing claim).

³⁷ A.R.S. § 40-253 states: “no claim arising from any order or decision of the commission shall accrue in any court to any party or the state unless the party or the state makes ... an application to the commission for a rehearing.”

1 file a timely application for rehearing under A.R.S. § 40-253 is barred from bringing a
 2 collateral attack on the decision in the courts. *Phoenix Ry. Co. of Ariz. v. Lount*, 21 Ariz.
 3 289, 301 (Ariz. 1920) (“It being evident that the [ACC] had jurisdiction to make the order,
 4 the decision was conclusive as against collateral attack as here attempted.”); *Ariz. Pub. Serv.
 5 Co. v. S. Union Gas Co.*, 76 Ariz. 373, 379 (Ariz. 1954).

6 SolarCity attempts to plead around the rehearing requirement by claiming it was not
 7 a “party” to the proceeding. (FAC ¶ 91). However, the official notice of the price process
 8 made clear that:

9 Persons wishing to participate in these proceedings may provide their names,
 10 addresses, telephone numbers, facsimile numbers (optional), and email addresses
 11 (optional) to the SRP Corporate Secretary. ***Persons providing their names and
 12 addresses to the SRP Corporate Secretary will be considered “parties” within the
 meaning of A.R.S. Sections 30-810 through 812 for the purpose of these
 38 proceedings.***

13 SolarCity did so and, therefore, is a party to the proceeding. In addition, SolarCity
 14 exercised the rights afforded under A.R.S. § 30-802(B), including examining financial
 15 documents, consultant reports, and other materials relevant to the proposal; submitting
 16 written materials; making oral presentations; and questioning the District’s employees and
 17 consultants during interviews conducted by counsel. *See* FAC ¶ 91, 92, and 96. Thus,
 18 SolarCity’s failure to comply with A.R.S. § 30-810 bars its state law claims.
 19

20 **VIII. SOLARCITY’S TORTIOUS INTERFERENCE CLAIMS FAIL WITH ITS 21 ANTITRUST CLAIMS**

22 SolarCity’s tortious interference claims should also be dismissed. “To be
 23 actionable, [tortious] interference must ‘be both intentional and improper Thus, there
 24 is ordinarily no liability absent a showing that defendant’s actions were improper.’”
Neonatology Assocs. v. Phoenix Perinatal Assocs., 216 Ariz. 185, 187-88 (App. 2007).
 25 Here, SolarCity’s interference claims rest solely on the same alleged misconduct as its
 26 failed antitrust claims. Conduct permitted under antitrust laws may not be punished as a
 27

28 ³⁸ See SRP Legal Notice (Dec. 12, 2014) (RJN Ex. 8) (emphasis added).

1 tort. “[S]uch common law ‘back dooring’ would subvert the function of antitrust law in
 2 defining, and regulating, the boundary between permissible and impermissible
 3 competitive conduct.” *Willamette Dental Grp., P.C. v. Oregon Dental Serv. Corp.*, 882
 4 P.2d 637, 644 (Or. Ct. App. 1994); *see also United Nat'l Maint.*, 766 F.3d at 1012 (state
 5 action antitrust immunity “dooms” any intentional interference with prospective
 6 economic advantage claim premised on challenged conduct).³⁹

7 **CONCLUSION**

8 For all the foregoing reasons, the District respectfully requests that the Court
 9 dismiss with prejudice Plaintiff SolarCity’s First Amended Complaint in its entirety.
 10 RESPECTFULLY SUBMITTED this 23rd day of June, 2015.

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³⁹ With dismissal of the federal law claims, diversity would be the sole basis for this court to exercise jurisdiction. The state law claims would therefore be barred by the Johnson Act, which states that “[t]he district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where: “(1) Jurisdiction is based solely on diversity of citizenship ... (2) The order does not interfere with interstate commerce; and, (3) The order has been made after reasonable notice and hearing; and, (4) A plain, speedy and efficient remedy may be had in the courts of such State.” 28 U.S.C. § 1342. Each element is met here.

CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2015, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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